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In the Supreme Court of the United States

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OCTOBER TERM, 1967

No. 782

INTERNATIONAL CABLE T.V. CORPORATION, a California corporation,
Petitioner,

vs.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, and PETER E. MITCHELL, WILLIAM M. BENNETT, A. W. GATOV, GEORGE G. GROVER, and FREDERICK H. HOLOBOFF, the members of and constituting said Public Utilities Commission,
Respondents,

THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a California corporation, and ALL METAL FABRICATORS, INC., a California corporation,
Real Parties in Interest.

On Petition for a Writ of Certiorari to the Supreme Court of the State of California

Brief of Respondents in Opposition

MARY MORAN PAJALICH
Chief Counsel

RODERICK B. CASSIDY
Assistant Chief Counsel

J. THOMASAN PHELPS
Principal Counsel

TIMOTHY E. TREACY
Principal Counsel

DONALD M. GRANT
Counsel

5072 State Building
San Francisco, California 94102

Attorneys for the Public Utilities Commission of the State of California

SORG PRINTING COMPANY OF CALIFORNIA, 346 FIRST STREET, SAN FRANCISCO 94105

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OPINIONS BELOW

On July 5, 1967, the Supreme Court of the State of California denied, without opinion, petitioner's Petition for Writ of Review of Decision No. 71559 of respondent Commission (hereinafter referred to as Commission), as yet

unreported but set out in Appendix A to the instant petition. On July 26, 1967, the Supreme Court of the State of California denied, without opinion, petitioner's request for rehearing of the order of July 5, 1967.

JURISDICTION

The basis of this Court's jurisdiction is set forth in the petition.

QUESTIONS PRESENTED

1. Whether petitioner was denied a hearing by the Commission in violation of its rights to due process of law.
2. Whether Commission Decision No. 71559 deprived petitioner of equal protection of the laws.
3. Whether Commission Decision No. 71559 is supported by substantial evidence.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED[1]

The Constitutional provision involved is Section 1 of the Fourteenth Amendment to the Constitution. The statute involved is Section 453 of the California Public Utilities Code..

STATEMENT

Petitioner's complaint before the Commission was a result of petitioner and All Metal Fabricators, Inc.[2] competing for the same community antenna television[3] market in the unincorporated area of Altadena in Los Angeles County.

On March 28, 1966, petitioner and The Pacific Telephone and Telegraph Company[4] entered into a pole attachment

1. Both are set forth at page 5 of the petition.
2. Hereinafter referred to as "All Metal".
3. Hereinafter referred to as "CATV".
4. Hereinafter referred to as "PT&T".

agreement. Under the terms of this agreement, petitioner leased vacant space on PT&T's telephone poles for petitioner's CATV pole attachments to be installed by petitioner at its expense.

A Memorandum of Agreement dated May 19, 1966, and a Contract for Community Antenna Television Facilities, dated June 13, 1966, were executed by PT&T and All Metal. Under the terms of the contract, All Metal's television signals were to be transmitted over PT&T's facilities in much the same manner that PT&T provides channels for the transmission of other private line services relating to telephony.

Petitioner, on August 15, 1966, filed a complaint with the Commission alleging that PT&T and All Metal had conspired to delay petitioner's entry into the CATV business by a crash program of building channel facilities for All Metal. In the complaint, petitioner sought damages, a cease and desist order, an order compelling PT&T to dismantle channel facilities thus far constructed, and Commission approval of its pole attachment agreement with PT&T.

The Commission, based on the allegation of the complaint and in order to preserve the status quo, on August 16, 1966, issued a temporary restraining order directing immediate cessation of PT&T's channel facilities construction and use of these facilities by All Metal. The Commission also ordered a hearing to be held on August 19, 1966, and directed PT&T and All Metal to file answers to the complaint.

A full day's hearing was held on August 19, 1966, producing a 140-page transcript. Several transcript references, standing alone, indicate that the hearing was limited solely to the issue of the temporary restraining order.[5] However,

5. At transcript pages 7, 13, 68, and 74, the hearing Examiner made statements to this effect.

at transcript page 76, the hearing examiner made quite clear the issue before the Commission. He stated:

> "EXAMINER GREGORY: I think as I view it now, without benefit of further advice from counsel, that the Commission is primarily interested at this stage in what is the nature of the facility involved in pole connection where the CATV operator provides his own line and his own hardware but simply uses the pole as a means to carry that line under an agreement with the utility on the one hand and as utility or non-utility nature, so far as the telephone company provision of that facility is concerned, which is the pole, and so forth, as distinguished from what apparently the parties concede to be utility service with respect to provision of channel facilities by the telephone company, where it installs the actual lines to the poles, and whether or not there is such a difference as would indicate that there is a line of cleavage so far as this Commission's jurisdiction may be concerned over recognition of pole attachment agreements filed by the telephone company and the channel agreements, so that we perhaps have something to do with the pole attachment and we might not have anything to do with the channel."

At page 77 of the transcript, the hearing examiner, after discussing the question of Federal Communications Commission jurisdiction, stated:

> ". . . I think we have to make up our minds before we determine just how far ahead we are going to go with this proceeding; that is, the merits and all the rest of it, because aside from whatever may be the defects in the complaint it perhaps alleges more than this Commission can handle in certain prayers made in the complaint. To the extent that the complaint may state a cause of action within this Commission's jurisdiction, assuming that there are issues framed by answers, we have to have a further consideration of those after we dispose of these preliminary issued."

It was then stated that this issue could best be disposed of by the parties filing memoranda of points and authorities.

At this point in the hearing, petitioner introduced the testimony of one of three witnesses present at the hearing. The testimony of this expert witness resulted in 56 pages of testimony. The content of this testimony, as stated by counsel for petitioner, at transcript page 72, was to describe the burden on the existing interstate telephone plant in connection with petitioner's request for a continuation of the temporary restraining order, and also "some of his comments may go to the question of jurisdiction and may be of some benefit to the Commission in that respect."

At the conclusion of the hearing, the following exchange took place between the hearing examiner and petitioner's counsel:

> "EXAMINER GREGORY: Is there anything further you gentlemen wish to bring up by way of testimony or further argument on this record other than written statements?
>
> MR. FARROW: No, Mr. Examiner. I think I have offered enough today on what I feel our position is."

After receipt of memoranda of points and authorities from all parties, the Commission issued Decision No. 71559 dismissing petitioner's complaint and dissolving the temporary restraining order. In that decision the Commission found the controlling issue of the complaint proceeding to be whether PT&T had unjustly discriminated against petitioner contrary to the provisions of Section 453 of the California Public Utilities Code. (Petition, Appendix A, p. 31).

Relying on the authority of a 1954 PT&T rate case,[6] the Commission held that, in the absence of a public offering,

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6. *Pacific Telephone and Telegraph Co.*, 53 Cal.P.U.C. 662, 664-666.

the rental or licensing by PT&T of vacant space on its telephone poles to CATV operators does not constitute public utility service (Petition, Appendix A, p. 35), and therefore such contracts need not be approved by the Commission.

The Commission concluded that petitioner, in executing a pole attachment agreement with PT&T, is not in like, or similar, circumstances with All Metal, whose agreement calls for the rendition of public utility service[7] in all respects like other private line services provided by PT&T[8] which are subject to different charges, restrictions and conditions of service than found in PT&T's pole attachment agreements. (Petition, Appendix A, p. 35).

ARGUMENT

I. Petitioner Knew the Issues Before the Commission and Received a Full Hearing on Them

Petitioner misconstrued the facts by alleging the Commission hearing of August 19, 1966 was limited to the issue of the temporary restraining order issued by the Commission. (Petition, page 6). The excerpt from the transcript quoted herein leaves no doubt that at that hearing the Commission was primarily concerned with the issue of whether PT&T's rental of vacant telephone pole space was a public utility service. It was made explicit by the hearing examiner that this threshold issue would be resolved before further hearings were scheduled or petitioner's complaint dismissed. (p. 4, *supra*).

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7. The Commission relied upon *Pacific Telephone and Telegraph Co.—Omni-Video, Inc.*, 63 Cal.P.U.C. 388.

8. E.g., teletypewriters, telephotographic and facsimile services, etc.

Petitioner objected neither at the hearing nor in its memorandum of points and authorities that the issue as framed by the hearing examiner would be decided on the basis of written memoranda rather than testimony. At no point during the proceedings did petitioner contend that any testimony was necessary to decide the matter.[9] Further, at the close of the hearing, in response to an inquiry of the hearing examiner, petitioner's counsel stated he had offered sufficient evidence to make clear to the Commission the position of petitioner.

Petitioner states the Commission finding that the leasing of vacant telephone pole space is different in kind, rather than degree, than the leasing of telephonic channel facilities, was a question of fact and was ". . . made without hearing, and without allowing petitioner an opportunity to produce evidence relevant to the question." (Petition, p. 15.) Variations of this argument are repeated by petitioner on the following two pages of the petition. These allegations are incorrect. The record shows that there was, in fact, a full hearing and that petitioner had the opportunity but saw fit not to present evidence on these questions at either the hearing or in its written memorandum to the Commission. To allege, as it does at page 3 of the petition, that the Commission rendered the decision without giving petitioner an opportunity to be heard on the issues of law and fact decided is untenable.

Petitioner's active participation in the Commission proceeding by argument, the presentation of testimony of an expert witness, and by written memorandum make it abundantly clear petitioner knew the scope of the proceeding, and, obviously, once the threshold issue was decided ad-

9. The testimony of petitioner's expert witness went primarily to the merits of the complaint.

versely to petitioner, the issues raised by the complaint were rendered moot.

II. The Dismissal of Petitioner's Complaint by the Commission Did Not Deprive Petitioner of Equal Protection of the Laws

This court stated in *Morey v. Doud*, 354 U.S. 457 (1957), at page 466, that distinctions in treatment of business entities engaged in the same business activity may be justified by genuinely different characteristics of the business involved. The basis for the difference in classification of PT&T's services provided petitioner and All Metal was made explicit by the Commission in Decision No. 71559. The Commission carefully set out its reason for each classification:

> The CATV channel facilities and service provided by Pacific [PT&T] either by written contract or pursuant to a tariff offering, unquestionably constitute "public utility service." Pacific constructs, owns, operates and maintains the plant used in the service and provides the energy for transmitting the signal through the facilities so constructed, in the same manner as it provides channels for transmission of other private line services related to telephony which, likewise, are offered to the public through facilities dedicated to the public use. Unless such CATV channel facilities are offered to the public by a filed tariff, authority must first be obtained by Pacific, pursuant to General Order No. 96-A, to make effective any special contract for their provision. (Petition, Appendix A, p. 32.)
>
> • • • • • • •
>
> Pacific's willingness, as pertinent to the present controversy, to enter into temporary individual license agreements with CATV operators for use by the latter of vacant space on its poles, is neither an offer nor a providing of "public utility service", since the utility does not hold out such contracts impartially to the general public or does it thereby provide any "serv-

ice" related to the concept of dedication to the public of a communication service or facility which is the hallmark of a public utility calling. (Id., p. 33.)

* * * * * * *

We hold, therefore, that in the absence of a public offering the rental or licensing by Pacific of vacant space on its poles to CATV operators does not constitute a "public utility service". Therefore, authorization by this Commission of the pole attachment agreement between Pacific and International [petitioner] dated March 28, 1966 is not necessary. Special individual contracts by Pacific for use of such facilities should, however, under the procedural rules mentioned above, be supplied for the information of this Commission.

It follows that complainant [petitioner], possessing a pole attachment agreement with Pacific is not in like, or similar, circumstances with All Metal, whose agreement with Pacific calls for rendition of a public utility service in all respects like other private line services provided by Pacific and which is subject to different charges, restrictions and conditions of service than those found in Pacific's pole attachment agreements. (Id., p. 35.)

The Commission, lacking jurisdiction over CATV operators,[10] was concerned only with PT&T's activities and merely concluded that the renting of vacant telephone pole space was not a public utility activity. Not being a public utility activity, the Commission lacks jurisdiction to entertain petitioner's complaint, and its dismissal was proper.

III. Decision No. 71559 Is Supported by Evidence

Assuming arguendo that the issue of public utility status of telephone pole space lease agreements presents a question of fact, Decision No. 71559 is amply supported by evidence.

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10. *Television Transmission, Inc. v. Public Utilities Commission*, 47 Cal. 2d 82 (1956).

Channel service agreements, such as All Metal's, are filed with the Commission, pursuant to Commission's General Order 96-A, because they are offerings of public utility service. All pole attachment agreements are filed with the Commission in order to "bring to the knowledge of the Commission the nature and extent of such contracts." (*The Pacific Telephone & Telegraph Co.*, 53 Cal.P.U.C. 662, 664-665 (1954)). Thus, both the All Metal channel service agreement and petitioner's pole attachment agreement were before the Commission.[11]

At the hearing of August 19, 1966, evidence and argument were received, defendants were directed to file answers, and the parties to file memoranda of points and authorities. The answers and memoranda were filed and considered by the Commission together with the complaint, PT&T's "Offer of Proof" filed prior to the hearing, and the evidence and argument adduced at the hearing.

The Commission based its decision on far more than a few facts gleaned from admissions in the pleadings as petitioner alleges (Petition, p. 22).

IV. No Important Federal Question Is Raised by Petitioner

This court's review of the Commission proceedings is not warranted. Decision No. 71559 was concerned with the narrow question of the public utility status of an agreement leasing vacant telephone pole space. Neither this decision nor petitioner's allegations concerning it raise important federal questions.

The California Supreme Court reviewed petitioner's contentions regarding Decision No. 71559. That review, al-

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11. The parties stipulated to the existence of the pole attachment agreement (Transcript, p. 18) and the hearing examiner took notice of the Channel service agreement (Transcript, p. 34).

though limited on issues of fact, is not limited on constitutional questions.[12] However, petitioner has not shown that the California Supreme Court decided the matter on a federal ground. This Court in *Stembridge v. Georgia*, 343 U.S. 541 (1952), stated at page 547:

> "Where the highest court of the state delivers no opinion and it appears that the judgment *might* have rested upon a nonfederal ground, this Court will not take jurisdiction to review the judgment."

In the proceeding before the California Supreme Court, although petitioner alleged deprivation of federal constitutional rights, that court could have decided the matter on the same basis as the Commission had, i.e., PT&T's agreements renting vacant telephone pole space do not constitute a public utility service.

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12. Public Utilities Code § 1760 provides:
In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari be denied.

Respectfully submitted,

MARY MORAN PAJALICH
Chief Counsel

RODERICK B. CASSIDY
Assistant Chief Counsel

J. THOMASAN PHELPS
Principal Counsel

TIMOTHY E. TREACY
Principal Counsel

DONALD M. GRANT
Counsel

Attorneys for the Public Utilities Commission of the State of California

Dated: December 1, 1967